

# Legal Origins Theory, Economic Development and Competition Law – Canada and Korea

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## Abstract

*Legal Origins Theory is a relatively recent school of thought developed by law and finance scholars within the framework of comparative legal studies. The proponents of the Theory posit that societies with different legal origins are associated with different legal rules, and these differently formed legal rules lead to different economic outcomes. The basic conclusion of the Theory suggest that common law based countries tend to do better as shown by economic indicators compared to civil law countries. The focus of this paper is to examine the Theory's findings in two stages. First, it will consider whether the Theory can be used to explain the rapid economic development of Korea over the last few decades. Second, this paper will examine whether competition (fair trade) law falls within the ambit of the Theory. This paper attempts to arrive at the conclusion that different stages of economic development would better explain (rather than legal origins) the need and development of laws governing economic development. The framework of analysis is adopted from the work of Christopher A. Whytock, which I refer to as modified functional approach.*

KEY WORDS: Comparative law; Competition law; Fair Trade law; Canadian Competition law; Korean Fair Trade law; Legal Origins Theory; Legal Origins; Economic Development and Law; Common Law; Civil Law; Comparative Legal Analysis

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## I. Part I - Introduction

### 1. *Legal Origins Theory*

Legal Origins Theory (the “Theory”) is a relatively recent school of thought developed by law and finance scholars within the framework of comparative legal studies. The proponents of the Theory posit that societies with different legal origins are associated with different legal rules, and these differently formed legal rules lead to different economic outcomes.<sup>1)</sup> A more detailed summary of highlights will follow in Part II, but it suffices to introduce their basic finding here as follows:

Compared to French civil law, common law is associated with a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labour markets, and smaller unofficial economies, and c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement.<sup>2)</sup>

The Theory’s findings are backed by sophisticated econometric analyses, adding a quantitative dimension to conventional comparative methodologies. While this may be a welcome addition to the arsenal of comparative methodologies, it must be noted that econometric analysis does not necessarily establish causality, and it must therefore be handled with much care and scrutiny. This is especially true where the Theory’s idea is catching on amongst powerful institutions that can potentially exert influence over policy choices in developing countries.<sup>3)</sup> The Theory

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1) Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, “The Economic Consequences of Legal Origins” (2007) NBER Working Paper No. 13608 at 20 [La Porta].

2) *Ibid.*

3) John Ohnesorge, “Legal Origins and the Tasks of Corporate Law in Economic

proposes a blueprint for reforms, suggesting appropriate institutions, or simply less government intervention in many instances, all based on common law style market economy ideals.<sup>4)</sup>

## 2. *Framework of Analysis*

For the purposes of this paper, the general framework of analysis is adopted from the work of Whytock, which will be referred to as “modified functionalist approach.” Whytock argues that the Theory has “a close affinity with functionalist comparative law,”<sup>5)</sup> and makes three criticisms and three corresponding suggestions regarding functionalism (and, by extension, the Theory). While Whytock’s insights are used liberally throughout the following discussions and analyses, this paper will also draw on other sources to critique the Theory regarding its specific aspects.

## 3. *Outline of Topics and Issues*

The primary focus of this paper is to question the Theory’s basic idea in two stages. First, it will examine whether the Theory has given sufficient considerations to the example of the Republic of Korea (“Korea”) during its rapid economic development over the last several decades. From the outset, it is difficult to see how stronger investor protection might have helped Korea during its predominantly state-driven efforts toward economic growth. This is one of many criticisms against the Theory voiced by Ohnesorge, Whytock and Siem. According to these scholars, the Theory surprisingly lacks any analysis of exceptions to their theory. Furthermore, Siem and Whytock argue that the convention of categorizing legal origins into four different legal traditions (Common, Civil, German and Scandinavian) has lost a lot of its relevance.<sup>6)</sup> This is especially true in the context of globalization where international trade and policy integration is

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Development: A Preliminary Exploration” (2009) BYU L Rev 1619 at 1624 [Ohnesorge].

4) La Porta, *supra* note 1 at 60.

5) Christopher A Whytock, “Legal Origins, Functionalism, and the Future of Comparative Law” (2009) BYU L Rev 1879 at 1880 [Whytock].

6) *Ibid* at 1900.

taking place at an unprecedented rate. Whytock asserts that “functionalist comparative legal scholars should therefore treat the appropriateness of a particular legal institution for a particular country, regardless of its origins, as an open question that needs to be addressed on a case-by-case basis in light of contextual factors.”<sup>7)</sup> This is the essence of the analysis that is to be conducted by this paper. The argument here is that a set of market conditions, as well as legal origins, is one of the contextual factors to be studied where laws that purport to govern economies are concerned. Thus, Part III of this paper will review the literature on this issue and summarize the findings against the Theory, using the example of Korea whenever relevant.

Second, this paper will examine whether competition law falls within the ambit of the Theory. Competition law is of particular interest since the Theory’s primary preoccupation is the formation of legal rules related to economic development and their outcomes. Similar to investor protection, which falls within the broader context of corporate law, competition law is an area of law that purports to regulate an economy in a manner conducive to economic development. By comparing the inception of competition law between Canada and Korea, part IV of the paper will attempt to reinforce some of the criticisms mounted against the Theory.<sup>8)</sup> The point of this analysis is to discuss how the law has been received in each country, where Canada is a common law country and Korea is a civil law country. Despite having distinctly different legal origins as classified by the proponents of the Theory, it is remarkable that the two countries exhibit no evidence of legal origins having any impact on their respective adoption of competition law. This paper will argue that, at least in competition law, it is the emergence of those problems in the market conditions that brought about the need for regulation, but not because one legal system was more favourable to adopt such regulation than the other. This in turn will be used to argue that in the case of Korea, investor protection was necessitated

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7) *Ibid* at 1903.

8) While the development of competition law in the U.S. or the U.K. also would have provided a good example of how competition law developed in a common law country, Canada is deliberately chosen so as to provide an example of a common law country that is considered as a small open economy similar to that of Korea. This accounts for possible differences in economic factors shaping competition law depending on the size of economy.

by the growing sophistication of its financial markets as a result of economic development, not that such protection would have been necessary while its financial markets were still nascent. Together with the argument presented in Part III, this paper will draw the conclusion that different stages of economic development would better explain the need and development of laws governing economic development.

## II. Part II – Introduction to Legal Origins Theory

### 1. General Assumptions

The theoretical underpinnings of the Theory start with the premise that distinct characteristics can be associated with different legal origins, classified as common, French civil, German civil and Scandinavian civil law. In this respect, the proponents define the term “legal origin” as “highly persistent systems of social control of economic life,” that have “significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes.”<sup>9)</sup> Although the proponents of the Theory do accept that these legal origins, when planted through conquest or colonization, might have evolved over time in their unique ways according to different circumstances, they maintain that “this adaptation and individualization, however, was incomplete.”<sup>10)</sup> What is implicit in this argument is that legal origins can be subject to *planting* and *persisting*. In other words, a legal origin can be injected into a country as a policy instrument. In short, it is not only possible to group countries into these categories, but it is also possible to determine which group performs better than others in terms of economic development, and use such information to inform policy choices. In their summary:

First, legal rules and regulations differ systematically across countries, and these differences can be measured and quantified. Second, these differences in legal rules and regulations are

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9) La Porta, *supra* note 1 at 63.

10) *Ibid* at 8.

accounted for to a significant extent by legal origins. Third, the basic historical divergence in the styles of legal traditions – the policy-implementing focus of civil law versus the market-supporting focus of common law – explains why legal rules differ. Fourth, the measured differences in legal rules matter for economic and social outcomes.<sup>11)</sup>

## 2. Findings

As a matter of fact, relying on a series of econometric analyses, the proponents find that common law countries are associated with legal rules more conducive to economic development compared to civil law countries.<sup>12)</sup> This is because “the built-in judicial independence of common law, particularly in the cases of administrative acts affecting individuals, suggests that common law is likely to be more respectful of private property and contract compared to civil law.”<sup>13)</sup> Furthermore, “common law’s emphasis on judicial resolution of private disputes as opposed to legislation, as a solution to social problems, suggests that we are likely to see greater emphasis on private contracts and orderings, and less emphasis on government regulation, in common law countries.”<sup>14)</sup> Finally, “the greater respect for jurisprudence as a source of law in the common law countries, especially as compared to the French civil law countries, suggests that common law will be more adaptable to the changing circumstances.”<sup>15)</sup>

Based on this set of seemingly uncontested generalizations, the proponents argue that these generalizations survive the scrutiny of time and transformation because the beliefs and ideologies incorporated in legal rules spread by way of osmosis into institutions and education, and are thereby transmitted over time and between generations.<sup>16)</sup> Thus, even if actual legal rules change, the spirit with which these legal rules are

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11) *Ibid* at 64.

12) *Ibid* at 20.

13) *Ibid* at 33.

14) *Ibid*.

15) *Ibid*.

16) *Ibid* at 39.

formulated will not wither away. The proponents fail to provide any articulated reason why this is the case (or why this has to be the case as they argue), but speculate that this is “perhaps because the legal system is such a difficult to change elements of social order, supported by legal institutions, human capital and expectations.”<sup>17)</sup> And the emphatic conclusion: “this, we submit, is what gives them explanatory powers.”<sup>18)</sup> The authors of the Theory conclude their paper with the following:

The world economy in the last quarter century has been surprisingly calm, and has moved sharply toward capitalism and markets. In that environment, our framework suggests, the common law approach to social control of economic life performs better than civil law approach. When markets do or can work well, it is better to support than to replace them. As long as the world economy remains free of war, major financial crisis, or other extraordinary disturbances, the competitive pressures for market supporting regulation will remain strong, and we are likely to see continued liberalization.<sup>19)</sup>

It must be noted here that the proponents do seem to realize that capitalism and markets have had something to do with what they observed, but it seems that they nevertheless concluded that this formed *part* of what they labelled as legal origins.

### III. Part III – Criticisms Against Legal Origins Theory

#### *1. Lack of Exceptions Analysis*

According to Ohnesorge, had the Theory been confined to its place in academia as a few scholars’ academic fancy, it would not be receiving this

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17) *Ibid* at 43.

18) *Ibid*.

19) *Ibid* at 66.

much attention and scrutiny as it is receiving now.<sup>20)</sup> The relevance of the Theory in our contemporary world economy is surprisingly far reaching as evidenced by the growing acceptance of legal origins approach in the context of development assistance through the World Bank's Doing Business project.<sup>21)</sup> The World Bank adopted a system in which countries are given scores according to a set of criteria that includes investor protection, an indicator that is borrowed directly from the Theory.<sup>22)</sup> This can have far reaching effects as it can affect the policy choices available to developing countries by shaping the content of binding obligations usually attached to assistance programs designed by assistance providers (not only the World Bank but a number of other powerful institutions), and also shaping the ideas and arguments policy makers in developing countries use to build their understanding of how corporate law should work in their economies.<sup>23)</sup>

The idea of generating policy prescriptions based on their Theory is fundamental to the work of legal origins scholars as they accept legal origins as something that is exogenously determined, i.e., something that can be injected into a country from outside. The basis upon which the legal origins scholars argue that legal origins can be thought of as an exogenous factor is the observation of a historical fact that legal origins (or legal traditions in this sense) were typically introduced through conquest and colonization.<sup>24)</sup> Based on these historical events, they argue that it is entirely possible to think of countries that were formerly colonized by common law countries to be common law countries today. Again, this conclusion is drawn from their definition of legal origins as "highly persistent systems of social control of economic life," that have "significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes."<sup>25)</sup> Before getting into the discussion of why this definition may be problematic (as a classification and grouping issue), it would benefit the

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20) Ohnesorge, *supra* note 3 at 1625.

21) *Ibid.*

22) *Ibid* at 1626.

23) *Ibid* at 1624.

24) La Porta, *supra* note 1 at 2.

25) *Ibid* at 63.



reader to recognize the possible shortfalls of the Theory as a theory of general application. A general theory, for it to have any practical value, should identify instances that do not come within its scope and attempt to reconcile or rectify its breadth accordingly.

One of the concerns raised by Ohnesorge is the Theory's apparent lack of attempt to explore successful economic development episodes of East Asia.<sup>26)</sup> Beginning in the 1960's, a group of civil law countries (following the classification made by the legal origins scholars) have experienced remarkably successful state-led economic growth, which, taken at face value, is directly antithetical to the core prescriptive argument of the Theory. Successful corporations in Taiwan and Korea provide a good example of this concern. To borrow the words of Ohnesorge, who raises this concern succinctly, "minority shareholder rights were weakly protected in law, but small investors who bought the floated shares in such corporations surely did not expect to be able to use the law to enforce their rights, and were instead playing the market in ways that did not matter much to the controlling shareholders because corporations had other sources of capital."<sup>27)</sup> This gives rise to an alternate hypothesis that it may have been prevailing market conditions that either necessitated or obviated the need for certain regulations to be in place, rather than having a legal origin that was more fertile to spawn those legal rules. In other words, it might not have been the underlying legal origin that provided the basis upon which investors found comfort in participating in financial markets (and thereby developing them); rather, it very well could have been the development of financial markets and increased participation by the public that brought about the need to have legislative checks in place.

Another concern raised by Ohnesorge is the Theory's over-emphasis on corporate law at the expense of numerous other variables.<sup>28)</sup> This concern also resonates with Whytock's concern. In his words:

It would seem that for a developing country with few successful corporations, the major tasks of corporate law would be to

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26) Ohnesorge, *supra* note 3 at 1629.

27) *Ibid* at 1630.

28) *Ibid* at 1630.

encourage entrepreneurs to invest their own capital in productive enterprises, to help them attract early-stage capital from outside investors as necessary, and to give them the incentives and the flexibility that would allow them to take the large risks that they will face as they try to capture markets and to grow. This is particularly true when the goal is export-led growth, in which products must compete on international markets, the competition will be fierce, and risk-taking and flexibility will be at a premium. None of these tasks is closely related to the strength of minority shareholder protections in corporate law, the central concern of Legal Origins.<sup>29)</sup>

Indeed, countries like Korea had weak minority shareholder protection during its growth spurt but investors did not expect to use legal mechanisms to enforce their rights as corporations had other sources of capital available to them, mainly in the form of state funding as part of national economic development plans.<sup>30)</sup> Furthermore, it is difficult to accept that managerial foul play was one of the primary concerns of a country like Korea that was one of the poorest countries in the world in the 1960's with only a few corporations to lead their economy. The concern, therefore, was not so much in regards to how private investments can be protected, but was in regards to how to generate enough national income to go around to the general population so they can start to make such investments. The jump start that was necessary was initiated by the state, contrary to the arguments set forth by the proponents of the Theory, who suggest that less government intervention is directly related to better economic conditions favourable to growth.

## *2. Problem of Categorization*

Further to the criticism above noted, the Theory has received many questions with respect to the way in which it categorizes countries into legal origins. Siem argues that the “relevance of legal origins for financial

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29) *Ibid.*

30) *Ibid.*

development is doubtful.”<sup>31)</sup> This is especially pronounced, he further argues, where other aspects of a society, such as politics, history, culture, religion, geography and prevailing economic conditions may be more determinative than merely belonging to one of the four categories of the Theory. Even apart from the obvious difficulty in isolating the impact legal origins may have on economic outcomes, there is a foundational problem with constructing a categorical framework associated with static definitions of what legal origins mean. For instance, Siem uses the example of Japan to illustrate this point. Although it is true that Japan borrowed substantially from the French and German codes between 1890 and 1900, the relevance of borrowed codes to Japanese law quickly waned because of American influence during the aftermath of World War II.<sup>32)</sup> Moreover, soon after the American occupation officials departed from Japan, Japan underwent a gradual process of “Japanization” of borrowed/planted laws, suited to their local needs and customs.<sup>33)</sup> The same can be said of Korea. Initially, Korea too borrowed heavily from the French and German codes but, today, it shares a lot of similarities with the American legal system, having its Constitution shaped by the U.S.<sup>34)</sup> In a world of freely flowing information, it would not be unusual for policy makers to look around the world for solutions tailored to their unique circumstances, having regard to political, social, economic conditions that shaped such circumstances. Korea, for instance, when it adopted its first competition law, had borrowed largely from the Netherlands.<sup>35)</sup> As can be readily observed, country specific common law/civil law distinction does not fit comfortably with how laws are actually formulated, borrowed and/or implemented.

Even at the most rudimentary level, the descriptions of legal origins that

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31) Mathias M Siems, “Legal Origins: Reconciling Law & Finance and Comparative Law” (2007) 52 McGill LJ 55 at 62 [Siems].

32) *Ibid* at 66.

33) Chan-Jin Kim, “The Antimerger Laws of the United States, Japan and Korea” (1984) 12 Korean Comp L 1 at 10 [Kim].

34) Oh Seung Jin, “Overview of Legal Systems in the Asia-Pacific Region: South Korea” in *Overview of Legal Systems in the Asia-Pacific Region* (2004) Paper 6 at 4.

35) Hanguk Gongjeonggeoraewiwonhoe [Korea Fair Trade Commission], “Hanguk Gongjeonggeoraewiwonhoe 30 Nyeonsa Yeongoo” [The 30 Years’ History of Korea Fair Trade Commission] (2010) at 115 [Hanguk].

are adopted by the proponents of the Theory are problematic. The characterizations are borrowed and accepted without much question from the works of Merryman and Dawson that are considered as merely introductory statements of legal origins. Lasser, in an attempt to correct the skewed depiction of the French system as the American system's "formalist other," uncovered, described and analyzed "what prior comparative descriptions had failed to take seriously into account, namely, the existence of an unofficial discursive sphere, within the French judicial system, in which the dominant mode of discourse and of reading proved to be precisely what was said to be lacking: socially responsible hermeneutics."<sup>36</sup> Of course, the concern with regards to socially responsible hermeneutics refers to the accusation that the French judicial system is merely administrative, lacking the kind of judicial considerations made public by judgments in common law jurisdictions. The proponents of the Theory would suggest that this is because civil law judges are state officials owing their allegiance to the empowering state whereas common law judges are independent from the state and therefore more likely to favour private property rights of the public in a contest between the state and the people. According to Lasser, however, "it is simply incorrect to presume that the official portrait's rigidly formalist conception of adjudication dominates the French civil legal system; for there exists, within the system, a vibrant institutional discursive sphere in which French academics and judicial *magistrats* seek to produce coherent, policy-based judicial responses to contemporary legal problems."<sup>37</sup> In other words, the rigid French conception of adjudication would require that French judges do no more than mechanically apply the dictates of the legislature as automatons, which obviously is not a fair depiction of the French judicial system.<sup>38</sup> Furthermore, Glenn accepts that there are many traces of Roman ideas in common law and admits that "between a writ system and continental, substantive law, there is no fundamental incommensurability," suggesting that clear cut boundaries between common law and civil law may only be

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36) Mitchel de S.-O.-J.E. Lasser, "Comparative Law and Comparative Literature: A Project in Progress" (1997) Utah L Rev 471 at 520 [Lasser].

37) *Ibid* at 497.

38) *Ibid* at 473.

imaginary.<sup>39)</sup> Therefore, this oversimplified categorization (and associated characterizations) of legal traditions is difficult to accept as it has been accepted by the proponents of the Theory, unless it is taken as a point of departure in order to analyze how legal systems differ from what they are expected to be considering different historical developments. The proponents of the Theory, however, simply accept that the civil law tradition “originates in Roman law, uses statutes and comprehensive codes as a primary means of ordering legal material, and relies heavily on legal scholars to ascertain and formulate rules,” citing to Merryman.<sup>40)</sup> Considering the difficulties associated with placing particular legal rules into rigid origin groups as discussed above (as a result of intermixing and borrowing), the basis upon which the Theory is built on certainly needs a serious reconsideration of how legal origins should be characterized and classified.

### *3. Methodologies Employed – Modified Functionalist Approach*

As previously commented, the Theory shares a few characteristics with functionalist comparative legal scholarship, which can be enumerated as follows: (1) a quest for better solutions to social problems; (2) a need to rely on causal inference; and (3) a need to consider the cultural, economic, political, and social context within which legal institutions exist.<sup>41)</sup> Functionalism is perhaps one of the most well known methodologies employed by comparative legal scholars, and one of the key characteristics of functionalism is its focus on legal solutions to social problems.<sup>42)</sup> The basic proposition is that “the legal system of every society faces essentially the same problems.”<sup>43)</sup> However, the overemphasis on “solutions” is problematic since “a legal solution that effectively mitigates a problem in one society might not be appropriate for another society if the problem

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39) H Patrick Glenn, *Legal Traditions of the World*, 4th ed. (New York: Oxford University Press, 2010) at 246 [Glenn].

40) La Porta, *supra* note 1 at 9.

41) Whytock, *supra* note 5 at 1880.

42) *Ibid* at 1881.

43) Konard Zweigert & Hein Kotz, *Introduction to Comparative Law* 3d ed. (Oxford: New York: Clarendon Press; Oxford University Press, 1998) at 34.

being solved in the former is different from the problem that needs to be solved in the latter.”<sup>44)</sup> As it was argued by Ohnesorge, it is not clear from the Theory whether the perceived “problems” that the proponents attempt to address are the problems that are generally shared by different countries (or at least amongst developing countries). In other words, the need for investor protection certainly was not a problem for Korea when it had only a few and mostly closely held corporations. Thus, it would be an absurd policy recommendation to make to Korea that it should adopt common law style investor protection mechanisms in order to promote a deeper, liquid financial market that would hopefully lead to economic development, all in the absence of public corporations. Therefore, it is suggested that there is an ambiguity with respect to this aspect of functionalism, and it requires clarification. Whytock questions whether “function” refers to the intended function of a legal rule or its actual consequences.<sup>45)</sup> He argues that “function” would imply some specific consequence that is known before a legal rule is implemented.<sup>46)</sup> Further to this argument, functionalist legal scholars should distinguish between the rule’s intended function and its actual consequences because (1) simply observing a particular consequence, however desirable, does not necessarily mean such consequence was one of the intended functions of a legal rule unless the intended functions are delineated and known beforehand, and (2) simply identifying intended functions of a legal rule does not speak to its efficacy until its consequences become known.<sup>47)</sup> Viewed in this light, this approach acknowledges and allows for the definition of “function” to vary both across and within different societies. Furthermore, “the intended function/actual consequences approach would recognize the relativity of the notion of “better solutions” and actual consequences would be assessed with reference to potentially diverse subjective understandings of intended functions, rather than based on presumptions about objective societal goals.”<sup>48)</sup> To use the example of Korea once again, the sequence of (1)

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44) Whytock, *supra* note 5 at 1886.

45) *Ibid* at 1889.

46) *Ibid*.

47) *Ibid* at 1890.

48) *Ibid* at 1891.

common law based investor protection regime (legal institution), (2) development of financial markets (intended function), and (3) economic development (desired/actual consequences flowing from the intended function) does not necessarily hold, since Korea achieved its economic development (desired consequence) without the first two elements. Therefore, it is dangerous to conclude that because this sequence worked in one country that it would also work in another. Provided that economic development is at least a desired consequence (as opposed to an actual consequence), there is a difficulty associated with linking this consequence with the intended functions of legal institutions when actual observations do not follow. Rather, a closer look at the Theory reveals its weakness in establishing causation.

Another crucial aspect of functionalism, even without having regard to the distinction made in the previous part, is causal questions and claims.<sup>49)</sup> Functionalists seek to find what causes certain legal institutions to be in place. In other words, their endeavour is to take legal institutions as effects (or functions), and explore the potential causes to establish a plausible cause and effect relationship. In this way, if it can be demonstrated that having a particular legal origin causes to bring about a particular effect measured in terms of economic performance, it may be argued that legal rules associated with that particular legal origin in fact caused the effects. However, even a well established cause and effect relationship is only as good as its assumptions about where it derives its causal inference (statistical analysis in the case of the Theory). The Theory relies almost exclusively on econometric analyses, but it is a well known fact that even statistically significant correlation coefficients at the highest error level do not necessarily determine causation. The proponents of the Theory observed that some very well known common law countries (again, as far as the classification goes without the criticisms noted above) tended to do better in terms of economic performance compared to civil law countries, and attempted to explain that observation with the idea that legal origins might have been the explanatory variable. Ohnesorge observes that this could be because the Theory “may have been developed in a mood of

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49) *Ibid* at 1892.

'irrational exuberance' over Anglo-American economic ascendance, and by people committed to a free-market vision of capitalism."<sup>50)</sup> This calls into question whether the relevant explanatory variable should have been economic ideals rather than legal ideals. Even if it is accepted that economic ideals are closely related to legal ideals, it still runs into the same causation problem. What is more, similar to the problem of classification of legal origins, it is difficult, if not altogether impossible, to classify economic ideals into pure breeds, and test the Theory on that basis. In any event, this analysis still would not explain the success stories of East Asian countries during the period of state-led growth since the countries were largely influenced by civil law traditions, and their economies were anything but free markets.

Finally, in addition to the criticisms identified above, Whytock criticizes functionalism for its lack of consideration with respect to cultural, economic, political, and social context within which legal rules exist.<sup>51)</sup> Whytock argues that "without understanding the potentially complex interactions between legal rules and contextual factors, it is difficult to estimate the causal effects of legal rules with a useful degree of certainty."<sup>52)</sup> In this regard, it is suggested that the Theory relax its near deterministic understanding of legal origins, while keeping legal origins as an important contextual factor to be considered.<sup>53)</sup> Thus, functionalist comparative legal scholars should treat the appropriateness of a particular legal institution for a particular country, regardless of its legal origins, as a question that needs to be addressed on a case-by-case basis in light of contextual factors. What is suggested is a nuanced and sophisticated understanding between legal rules and contextual factors, and how they interact to affect various economic, political, and social outcomes, rather than contextual determinism or one size fits all assumptions.<sup>54)</sup>

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50) Ohnesorge, *supra* note 3 at 1628.

51) Whytock, *supra* note 5 at 1902.

52) *Ibid* at 1898.

53) *Ibid* at 1902.

54) *Ibid* at 1903.



## **IV. Part IV – Inception<sup>55)</sup> of Competition Law in Canada and Korea**

### *1. Introduction*

In this part of the paper, Whytock's framework of comparative analysis is adopted in an attempt to compare the inception of competition law in Korea and Canada. First, it will briefly discuss the historical inception of competition law in each country. By looking at the historical inception of competition law in each country, an attempt will be made to identify some of the contextual factors that led to legislative action. Second, this part will discuss the intended function and actual consequences by looking at the legislative purpose and economic conditions that necessitated the need for institutional intervention. Then, the rest of this part will discuss the difficulty in connecting the historical development and contextual factors to the general premises of the Theory. It is noted at this point that sophisticated econometric analysis is beyond the scope of this paper and, as such, will not form part of this discussion.

Again, competition law is of particular interest since the main focus of the Theory is placed primarily on economic development (socially desirable outcome or, in other words, a social problem) and how legal rules can aid in bringing about such outcomes (legal solutions). The link between legal solutions to social problems is central to functionalist comparative scholarship as discussed in Part III of this paper.

Any attempt at discussing the contextual factors that set out the stage upon which both Korea and Canada strive to achieve these socially desirable outcomes necessarily begins with a short reference to globalization. Although the phenomenon fails to take on a clear cut definition, even a casual observer may be aware that an increasing number of countries are opening up their borders not only to incoming imports or

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55) This word is deliberately chosen to reflect the fact that the purpose of this part is not to conduct an in-depth study of how competition law developed over time into their current state in each country, but to focus primarily on what relevant factors were present at the time of their respective formation.

outgoing exports but also to incoming economic ideals of free markets and free trade, slowly limiting the role of central planning.

Assuming that basic economic principles hold, it is true that free competition fosters an environment in which firms compete to achieve better productivity, greater efficiency and improved product quality (among other things, of course). Therefore, more fierce the competition, the stronger the survivors must be. Those surviving firms, then, are the ones most capable of participating in international stages. Some scholars go as far as to say that a country's international competitiveness is determined by its domestic competition.<sup>56)</sup> Though grossly simplified, this is why a growing number of countries are adopting competition laws. By 2000, more than 80 countries in the world, accounting for more than 80 per cent of world production, have adopted competition laws, "recognizing the growing importance of competition law and policy to maximize economic welfare and balancing the exercise of market power with the creation of increased prosperity and innovation."<sup>57)</sup> The general purpose of any competition law regime, therefore, is closely connected to establishing economic conditions that result in economic development.

## *2. Inception of Competition Law in Canada*

Following the classification made by the proponents of the Theory, Canada is a common law country. There is nothing particularly wrong with this classification but, as discussed in Part III of this paper, the characteristics associated with the common law tradition as claimed by the proponents give only a superficial gloss over what it actually entails. In other words, the classification is acceptable so far as it remains descriptive only. It becomes a much more complicated task to somehow translate those mere descriptions into "causes" capable of producing "consequences."

The common law tradition as we know it, with judges playing the central role of making laws, began its development with the Norman Conquest of 1066. It is still recognized by the importance it places on the

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56) See Michael Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990).

57) Brian A. Facey & Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States* (Markham: LexisNexis, 2006) at 2 [Facey].

judge and judicial decisions today, but there are “only a few constituent parts of the original structure still remaining.”<sup>58)</sup> By the nineteenth century, the common law tradition had developed a large measure of compatibility with that of the civil law tradition, as the general idea of national, positive, constructed law received a great support.<sup>59)</sup> Legislation, not surprisingly, is commonplace in many common law countries today. Furthermore, Glenn argues that legislation in the U.S. has “assumed civilian proportions and often receive civilian treatment,” where legislation “receives a broad, liberal interpretation, in keeping with civilian doctrine.”<sup>60)</sup> The same concern that was raised in part III with respect to classifications issues resonates throughout this paper and this is yet another instance of how fitting countries into legal origin pigeon holes is problematic.

In Canada, investor protection is largely dealt with by its provincial securities acts, and cases involving securities regulation are handled by specialized administrative bodies. Similarly, competition is regulated by the *Competition Act*,<sup>61)</sup> and cases involving competition matters are handled by the Competition Bureau of Canada, another specialized administrative body. This is not a distinctive feature of Canada as the U.S. has its Federal Trade Commission and Korea has its Korea Fair Trade Commission, all of which are administrative bodies somewhat removed from their respective judiciaries. Although the decisions of the Competition Bureau of Canada are ultimately reviewable by courts, it has been recognized in Canada that:

The aims of the Act are more economic than they are strictly legal. The efficiency and adaptability of the Canadian economy and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the

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58) Glenn, *supra* note 38 at 253.

59) *Ibid* at 259.

60) *Ibid* at 264.

61) RSC 1985, c C-34.

administration of the civil part of the *Competition Act*.<sup>62)</sup>

By its very nature, economic regulation tends to rely heavily on state intervention. Thus, it is not a stretch to conclude that competition regulation, as well as securities regulation, is quintessentially a state led institution. While the proponents of the Theory maintain that common law countries are more apt to resolve market problems with private solutions, in the areas of economic regulation, regulations are put in place because those market problems were created by socially undesirable private dealings (i.e., crooked private solutions). For instance, monopoly benefits are what might entice entrepreneurs to innovate and capture the market in its entirety (which, of course, is at the core of capitalist market economies), but a prolonged period of monopolist pricing is thought to be harmful to the economy because it prevents further innovation by hindering competition, and by preventing other competitors from putting downward pressure on the price. The idea behind regulating competition therefore lies in the notion of welfare maximization of the overall economy, based on mainstream economic theories. It is beyond the scope of this paper to discuss the details of those mainstream economic theories, but the point here is that these regulatory institutions are largely driven by economic principles built by economists, not by legal scholars. Put differently, the key characteristics of a common law country (respect for private property, judges tend to take sides with private parties, less state intervention, among others) propounded by the Theory has little, if any, place in the regulation of competition. To put it more conservatively, it is difficult to make any realistic connection between those characteristics and the existence of competition regulation. To further develop this point, a brief look at the early implementation of competition law in Canada follows.

Canada is the first western industrialized country in the world to adopt a formal set of competition rules in 1889. In 1890, the U.S. followed suit with its own antitrust act. The Canadian legislation was introduced on the basis of a report of a select committee of the House of Commons that investigated the existence of combinations in Canada and their effects on

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62) *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 SCR 748 at para 48.

the Canadian economy. The report did not find any evidence of combinations but concluded that their potential harm necessitated legislative action.<sup>63)</sup> This indicates that those market conditions capable of providing a stage for free competition were already present to warrant some safeguards. In other words, even though there was no evidence of anticompetitive behaviour in the market, the market existed consisting of corporations that were capable of producing the harm sought to be proscribed. Section 1.1 of the *Competition Act* provides as follows:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and products choices.<sup>64)</sup>

It is clear from the purpose provision of the *Competition Act* that one of its primary concerns is Canada's economic wellbeing. Moreover, it is also clear that the kind of economy envisioned in the regulation is that of a market economy. Thus far, it would seem that the Theory would argue that it is consistent with one of the characteristics of the common law tradition (in that common law countries tend to favour market economies). Furthermore, Canada had trouble implementing the regulation in its early years, which would suggest that common law countries are not comfortable with state intervention. In its early years, because of the close proximity between Canada and the U.S., both in terms of geography and economy, the two countries shared a lot of substance in terms of their competition rules. But, Canada lagged behind its southern neighbour in developing a body of competition law jurisprudence because of the constitutional division of powers. The Canadian federal legislature struggled to fit competition law into one of the enumerated heads of federal power as

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63) *Ibid* at 6.

64) *Supra* note 59.

delineated in its Constitution. The primary objective of the *Act for the Prevention and Suppression of Combinations in Restraint of Trade*<sup>65)</sup> (the very first competition act) was to *criminally* prohibit conspiracies, combinations, agreements or arrangements whose purpose was to unduly prevent or lessen competition.<sup>66)</sup> Therefore, Canadian courts had difficulty prosecuting competition cases at first because of the rigorous evidentiary demands of the criminal process, coupled with its high standard of proof (beyond a reasonable doubt, compared to civil matters on a balance of probabilities). It was not until 1989, a hundred years after the first enactment, Canadian competition law was held to be within the federal jurisdiction under the broader “trade and commerce” power, which led to the beginning of a two – tiered system (criminal and civil).<sup>67)</sup> It is important to note here that the difficulty was associated with its political structure, not necessarily an issue out of common law/civil law distinction. In short, it seems that the Theory has little relevance in the development of Canadian competition law since (1) Canada did not let the free market to their own devices as they concluded that state intervention was necessary, and (2) its initial difficulty with the law was a constitutional issue, not a common law/civil law issue.

## 2. Inception of Competition Law in Korea

A study of Korean law is never complete without first considering Japanese law. Japan reconstructed its legal system in 1899, mostly borrowing the codes from France and Germany.<sup>68)</sup> After World War II, the Japanese legal system experienced a great deal of American influence as their constitution was largely written by the U.S. As such, some areas of law were changed to reflect the adversarial process similar to that of the American system.<sup>69)</sup> Korea treaded a similar path. Even after Korea was emancipated from Japan, the codes that the Japanese brought remained.

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65) SC 1889, c 41.

66) Facey, *supra* note 55 at 3.

67) *Ibid.* This suggests that the underlying difficulty did not arise from the fact that Canada is a common law country.

68) Kim, *supra* note 32 at 18.

69) *Ibid* at 19.

Furthermore, its first constitution was again largely written by the U.S. Numerous attempts have been made to emulate the American system whenever necessary while keeping its code system intact. Court precedents are not considered as law *per se* but, in practice, the decisions of the Supreme Court of Korea have strong precedential value. Thus, it can be seen as having a plethora of elements from each of French, German and American legal systems.

The first competition act was promulgated on December 31, 1980 and became effective and enforceable as of April 1, 1981. The purpose of the act is to encourage fair and free competition and stimulate creative business activities while protecting consumers, and promoting a balanced development strategy. The act attempts to prohibit control of market dominating power by entrepreneurs, by proscribing excessive concentration of economic power, and by controlling undue collaborative activities and unfair trade practices. The act stipulates: (1) prohibition of abuse of market-dominating positions, (2) restriction on combinations of enterprises, (3) restrictions on undue collaborative activities, (4) prohibition of unfair trade practices, (5) regulation of trade associations, (6) restrictions on resale price maintenance, and (7) restrictions on international agreements.<sup>70)</sup>

The Korean economy passed the take-off stage around 1967. Prior to its rapid economic development, the agricultural sector comprised 65% of the population. However, even when the growth rate started to pick up speed, and was heralded by some as a miracle, when the Korean government first introduced a legislative proposal called the “Monopoly Prohibition Act,” the per capita income was only about 210 U.S. dollars.<sup>71)</sup> Not surprisingly, under these circumstances, regulation of competition was certainly not one of the priorities of the government. It is noteworthy that the Korean government actually favoured the concentration of economic power in the hands of a few until 1979.<sup>72)</sup> The government doled out tax benefits and low interest long term loans to entrepreneurs in a few leading sectors and strategic industries in order to gain an international competitive edge.<sup>73)</sup>

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70) *Ibid* at 27.

71) *Ibid* at 8.

72) *Ibid* at 9.

73) *Ibid*.

This also explains why stronger investor protection rules would not have made much difference while Korea was going through these growth spurts as the government owned central bank was lending to these entrepreneurs at a rate no investor would ever invest. This goes directly against the idea that a particular legal origin is more likely than another to produce legal rules more favourable to investors. In other words, it simply does not seem likely that stronger investor protection was the reason a strong financial market developed. The reverse seems more likely. Conversely, the development of competition law had little, if anything, to do with its legal origin. As discussed, competition regulation would have run afoul of the prevailing economic policy at the time.

Kim suggests that the enactment of competition laws bears a close relationship with the level of economic development.<sup>74)</sup> The U.S. was one of the first to enact such regulations but only after reaching a fairly sophisticated level of industrialization. The concentration of economic power which resulted from the rapid growth of American capitalism beginning in the 1870's motivated the development of competition laws. Korea was no different. While the question of economic policy may be informed by various alternatives, including the Theory, the ultimate justification must be backed by concrete social and economic realities. For instance, in a developing country where the level of industrialization is low and the economy subsistent, the whole conception of competition law is incompatible.<sup>75)</sup> Gongjeong Gorae Wiewonhoe (Fair Trade Commission) on its 30 year anniversary report summarizes the background as follows:

Up until the 1970's, our economy has experienced unprecedented economic growth and development. At the same time, however, we began to realize the limitations and shortfalls of state organized economic development policies. In order to overcome this problem we attempted to change the basic structure of our economy from one that is state-led to one that is market driven. This meant the genesis of a capitalist market economy and, as such, we felt the need for a set of rules to ensure the proper working of this newly conceived

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74) *Ibid* at 10.

75) *Ibid* at 7.



economic paradigm [translated].<sup>76)</sup>

The point here is that it was the recognition of market conditions that necessitated state intervention, not the other way around.

### *3. Summary of Part IV*

Having looked at the development of competition law in both Canada and Korea, it becomes apparent that the traditional functionalist comparative scholarship's assumption that different societies have essentially the same problem is not completely meritless. It was because of the growing sophistication of market conditions in both countries that led to the development of competition rules. However, the "function" does not necessarily mean the same rules that produce the same consequences in different countries. As it was argued by Whytock, in order to compare the functions of different legal rules, it is imperative to distinguish between the rule's intended functions and actual consequences. In other words, even if the intended functions of competition rules are the same across both countries, its actual consequences would be drastically different if the rule's implementation was not in sync with their economic development pattern. Conversely, actual consequences (that Canada and Korea both achieved significant economic development) do not necessarily mean that the implementation of competition rules was intended to bring about those consequences. This would require quantifying the impact of competition rules in each of their economies. This, however, is not plausible as myriad factors contribute to any kind of measurable economic indicator. Furthermore, even if quantified, it would still suffer from the causation problem that was highlighted in Whytock's criticisms against the Theory. Looking at the contextual factors that led to the development of competition law, however, gives rise to a hypothesis that prevailing market conditions perhaps better explain the introduction of legal rules that purport to aid economic development. It may be true that legal origin influences other aspects of society as it is often deeply enmeshed into any

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76) Hanguk, *supra* note 34 at 14.

given country's social, economic and political fabric. It is difficult to think, however, that legal institutions are not affected by other social, economic or political factor in a society in which they co-exist.

## **V. Part V – Conclusion and Further Research**

The purpose of this paper was to question the Theory's basic idea in two stages. First, it was questioned whether the Theory has given sufficient considerations to the exceptions to its Theory. Second, an attempt was made to provide a brief overview of the development of competition law in two countries – one common law and one civil law. The second prong of the analysis was to provide an example of economic regulation that seemingly had little to do with legal rules shaping the stage for economic activities. It was chosen to illustrate the potential error in making causation arguments as put forth by the Theory. The Theory's strength is in its observation of empirical data that seem to suggest that common law countries tend to have (1) strong economies, (2) big and powerful corporations that undoubtedly contributed to having such strong economies, (3) liquid financial markets from which those corporations must have benefited from, and (4) regulations that maintain such conditions. The Theory argues that this sequence has something to do with legal origins. The proponents argue that liquid financial markets, without which corporations would hardly survive, are there because the common law tradition has historically emphasized the respect for private property, and such respect is now embodied in rules to protect private individuals in the form of investor protection. To a casual observer, this may make both logical and sequential sense. A careful look, however, reveals that it might as well have been the development of financial markets that necessitated the regulation. Moreover, the mechanism through which these regulations are implemented is by legislation, usually by administrative regulatory bodies. The argument that common law countries are associated with less state intervention again loses much of its teeth, as well as the argument that common law judges tend to favour private outcomes. The primary focus was given on the example of Korea. Korea, contrary to the Theory's hypothesis about legal origins has achieved remarkable economic

development. Furthermore, Korea has implemented many legal rules purporting to aid in its continued economic growth, including investor protection and the regulation of free and fair competition, despite the fact that its legal origin traces back to the civil law tradition. It is worth mentioning that Korea is not a sole outlier as there are plenty of other examples where significant economic development was realized in so-called civil law countries. In so doing, this paper raised a question as to whether the inherent common law ideals (as argued by the proponents of the Theory) contributed to the formation of legal rules that purportedly provide a springboard for economic growth. The research suggests that, at least in competition law, it is difficult to establish such a case. In addition, an attempt was made to highlight some of the criticisms mounted against the Theory from a theoretical perspective. The Theory suffers from a categorization problem as the distinction it makes among different legal origins has lost a lot of its relevance. Also, the Theory suffers from a causation problem as econometric analysis cannot be determinative of causal relationship. Lastly, the Theory shares some of the weaknesses identified in traditional functionalist comparative methodologies. It makes causal claims without clearly defining intended functions and actual consequences, and fails to take seriously numerous contextual factors that clearly affect (1) policy choices, (2) circumstances that give rise to the need for policy responses, and (3) how policies are implemented. In conclusion, it seems that market conditions (out of many contextual factors) may have been *the* reason why some economic regulations, such as competition regulation, develop.

As previously noted in this paper, a growing number of countries are enacting their own competition law, including such developing economies as China and India. In-depth analysis of what factors might have contributed to this phenomenon would be an interesting topic for future research, having regard to the issues raised in this paper. It would also be interesting to see this kind of analysis done in other areas of law involving other countries.

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